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Legal

MEMORANDUM FOR: See Distribution

STAT FROM :
Chief, Legislation Division/OLC

SUBJECT : H.R. 218

1. Subject legislation has been introduced recently by Representative George E. Danielson (D., Calif.) and has been referred to the Committee on the Judiciary.

2. Representative Danielson has introduced a number of bills in the 96th Congress to amend the "Administrative Procedure Act" (5 U.S.C. 551 et seq.). H.R. 218 warrants close scrutiny and, accordingly, is being brought to your attention for review from the viewpoint of possible impact on CIA.

3. The Administrative Procedure Act, in general, provides the statutory guidelines according to which U.S. Government agencies -- as that term is defined in 5 U.S.C. 551(1) -- function administratively vis-a-vis the citizenry-at-large. Chapter 5 of Title 5 contains individual sections dealing with:

- Public information; agency rules, opinions, orders, records, and proceedings (Section 552);
- Rule making (Section 553);
- Adjudications (Section 554);

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- Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision (Section 556);
- Initial decisions ... (Section 557); and
- Imposition of sanctions ... (Section 558).

It is to be noted that the CIA by definition is subject to the APA. However, even though the Agency itself is not specifically exempted from the Act's applicability, the specific subject matter in which the Agency deals, viz., foreign affairs and the type of information with which the Agency deals, viz., information specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and properly classified, have been exempted from coverage.*

4. Subject bill, in addition to amending the definition of "rule" (5 U.S.C. 551(4)) which appears to be of no consequence to Agency concerns, would:

- amend the "military or foreign affairs" exemption under 5 U.S.C. 553(a)(1) adding thereto a proper classification element; and,
- expand the 5 U.S.C. 553(b)(3)(B) exemption concerning general notice of proposed rule making to include in the term of art "contrary to the public interest" the "interest of national defense or foreign policy in a matter pertaining to a military or foreign affairs function."

Arguably the 5 U.S.C. 553(b) amendment is of little consequence since 5 U.S.C. 553(a) makes the "military or foreign affairs" exemption applicable to all of Section 553. The issue to be decided appears to be whether the amendment to paragraph 553(a)(1) is such that Agency equities would be adversely affected. While the amendment does impose two additional elements before the exemption is appropriately called into play, it is hard to envisage any matter with which this Agency deals that wouldn't meet those new elements.

*5 U.S.C. 552(b)(1)(A), 553(a)(1), 554(a)(4), 555(a), 556(a), 557(a)

5. In any event, it is likely that Congressional attention will focus on the Administration's Administrative Procedure Act amendments when these are introduced, and Mr. Danielson's bill is, at the moment at least, only one among a host of similar "reform" proposals. The Administration's proposal has been discussed by OGC and OLC and determined not to affect Agency equities.

6. This bill is, therefore, provided mainly for your information at this time. Any comments you might have should be forwarded to of my staff.

Attachment

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1 - OLC Subject

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